

University of Wollongong
Research Online

Faculty of Law, Humanities and the Arts -
Papers

Faculty of Arts, Social Sciences & Humanities

1-1-2013

**Unprecedented factory fire of Tazreen Fashions in Bangladesh: revisiting
Bangladeshi labour laws in light of their equivalents in Australia**

S M. Solaiman

University of Wollongong, sheikh@uow.edu.au

Follow this and additional works at: <https://ro.uow.edu.au/lhapapers>



Part of the [Arts and Humanities Commons](#), and the [Law Commons](#)

Recommended Citation

Solaiman, S M., "Unprecedented factory fire of Tazreen Fashions in Bangladesh: revisiting Bangladeshi labour laws in light of their equivalents in Australia" (2013). *Faculty of Law, Humanities and the Arts - Papers*. 1287.

<https://ro.uow.edu.au/lhapapers/1287>

Research Online is the open access institutional repository for the University of Wollongong. For further information contact the UOW Library: research-pubs@uow.edu.au

Unprecedented factory fire of Tazreen Fashions in Bangladesh: revisiting Bangladeshi labour laws in light of their equivalents in Australia

Abstract

Right to life is a core human right, but workers' lives seem to be dreadfully cheap in Bangladesh. This is so because the government appears to be complacent by offering a small amount of money to the families of victims of fires at garment factories and collapses of factory buildings. Previously, at least 1,000 workers have been killed in garment factories alone in Bangladesh from 1990 to 2012, ironically, all went unpunished. Recently, the devastating fire at Tazreen Fashions Ltd. which killed 112 in November 2012 and, just a few months apart, the horrifying collapse of Rana Plaza which housed five garment factories causing death of 1,129 workers have wounded the conscience of humankind all over the world and have locally created public outcry for the exemplary punishment of the culprits to prevent further deaths at work. This article examines the Bangladeshi health and safety legislation to find criminal liabilities of the entity and its executives for the casualties of the unprecedented fire at Tazreen. It reveals that, though they all may be held liable under the legislation, the law needs to be amended to provide greater clarity of safety duties and increase penalties.

Keywords

their, equivalents, australia, unprecedented, fire, factory, tazreen, fashions, bangladesh, revisiting, bangladeshi, labour, laws, light

Disciplines

Arts and Humanities | Law

Publication Details

S. M. Solaiman, 'Unprecedented factory fire of Tazreen Fashions in Bangladesh: revisiting Bangladeshi labour laws in light of their equivalents in Australia' (2013) 31 (1) Hofstra Labor and Employment Law Journal 125-157.

**Unprecedented Factory Fire of *Tazreen Fashions* in Bangladesh: Revisiting Bangladeshi
Labour Laws in Light of Their Equivalents in Australia**

S M Solaiman, PhD (Wollongong), LLM (Western Sydney), LLM (Dhaka) LLB Hons (Rajshahi)
Senior Lecturer
School of Law
University of Wollongong
NSW 2522, Australia
Email: sheikh@uow.edu.au
Phone: 61 2 42213116
Fax: 61 2 4221 3188

Unprecedented Factory Fire of Tazreen Fashions in Bangladesh: Revisiting Bangladeshi Labour Laws in Light of Their Equivalents in Australia

S M Solaiman*

Right to life is a core human right, but workers' lives seem to be dreadfully cheap in Bangladesh. This is so because the government appears to be complacent by offering a small amount of money to the families of victims of fires at garment factories and collapses of factory buildings. Previously, at least 1,000 workers have been killed in garment factories alone in Bangladesh from 1990 to 2012, ironically, all went unpunished. Recently, the devastating fire at Tazreen Fashions Ltd which killed 112 in November 2012 and, just a few months apart, the horrifying collapse of Rana Plaza which housed five garment factories causing death of 1,129 workers have wounded the conscience of humankind all over the world and have locally created public outcry for the exemplary punishment of the culprits to prevent further deaths at work. This article examines the Bangladeshi health and safety legislation to find criminal liabilities of the entity and its executives for the casualties of the unprecedented fire at Tazreen. It reveals that, though they all may be held liable under the legislation, the law needs to be amended to provide greater clarity of safety duties and increase penalties.

A. Introduction

The devastating fire at Tazreen Fashions Ltd (Tazreen) in November 2012 and, just a few months apart, the horrifying collapse of Rana Plaza which housed five garment factories causing combined deaths of more than a thousand poor workers have wounded the conscience of the world community. Pope Francis has condemned workers' present conditions at garment factories and termed it as 'slave labour,' and said that unjust salaries and the unbridled quest for profits were 'against God'.¹ The UN Secretary-General was 'saddened by the loss of lives' and the EU Heads of Missions in Dhaka expressed their shock at the casualties of Rana Plaza.² The ILO has urged the Government of Bangladesh to take immediate action to ensure safety of garment workers and to prevent a 'recurrence of the latest in a series of entirely avoidable workplace tragedies',³ while the US has already taken a 'punitive measure' by suspending the generalised system of preference for Bangladesh in the aftermath of the tragedies against such gross violation of safety requirements asking the country to improve its labour conditions.⁴ All these imply the extent of fatalities and the fragility of workplace safety in Bangladesh. Nonetheless, no serious effort to improve

*S M Solaiman PhD (UOW), LLM (UWS), LLM (DU), LLB Hons (RU), is a Senior Lecturer, School of Law, University of Wollongong, NSW, Australia. Email: sheikh@uow.edu.au.

¹ Nurul Huda, 'Slave labour: Practice of Political Impunity Has to Go' *The New Nation*, Dhaka (3 May 2013), Editorial –Commentary.

² Nizam Ahmed, 'UN Chief Condolences Deaths in Savar Bldg Collapse' *The Financial Express*, Dhaka (28 Apr 2013), Metro.

³ 'ILO for Quick Action - Ensure Safety to Garment Workers' *The New Nation*, Dhaka (5 May 2013), 'ILO Suggests Steps on Factory Safety' *The Financial Express*, Dhaka (3 May 2013), First page.

⁴ Wasi Ahmed 'US GSP Suspension and the Worry-box' *The Financial Express*, Dhaka (30 Jun 2013), Editorial.

workplace safety has been put in place to date as reported by the Economist, a British weekly.⁵

The country's worst industrial blaze occurred when the fire ripped through a nine-storey factory building of Tazreen in Ashulia on 24 November 2012. The fire killed at least 112 workers and injured about 100 others, which had been alarming news across the globe.⁶ Despite such a big flame, burning of factories is on the rise in Bangladesh. Smart Export Garment Ltd in Dhaka (the capital city) caught fire on 26 January 2013 killing not less than seven female garments workers who had died of suffocation,⁷ and fire at Tung Hai Sweater Factory in Dhaka occurred on 8 May 2013 that killed eight people including its owner/managing director and Additional Deputy Inspector General of Police.⁸ Another blaze occurred on 13 June 2013 damaging the six-storey Aerba Garment Factory in Ashulia that ended up injuring only a few, thanks God, most of the workers were absent during the flame which started at 9:00 am originating from its ground floor godown.⁹ Yet another fire broke out at 3:30 am on 30 June 2013 this time at a shoe factory called Papella Shoes Ltd in Chottagong Export Processing Zone. Luckily, fire fighters were able to contain the fire without any fatalities as the factory was closed during that early morning.¹⁰

Shockingly enough, mourning and grieving for factory casualties seem endless in Bangladesh as Rana Plaza at Savar (30 km away from the capital city) collapsed on 24 April 2013 killing 1,129 and injuring more than 2,500¹¹ who were reportedly forced to enter the building against their will on the dreadful day in defiance of all warnings from concerned authorities of its imminent demise.¹² Several other buildings did collapse in the past but no one has been punished to date mainly because the victims were poor workers, said a retired Cabinet Secretary.¹³ An analysis of building collapse falls outside the purview of this endeavour as it is concerned solely with factory fires which occur more frequent than other incidents.

The Washington-based International Labour Rights Forum (ILRF), as it finds at least 1,000 workers were killed, while 3,000 others were injured in more than 275 incidents in garments

⁵ 'No Serious Efforts' to Improve Factory Safety - The Economist Focuses on Rift among Retailers' *The Financial Express*, Dhaka (13 Jul 2013), Last page.

⁶ Tawfique Ali, Tazreen Garment Factory - Unfit Yet Licensed as Fire-fit' *The Daily Star*, Dhaka (30 Jan 2013), Front page; '37 Identified by DNA Test' *The Daily Star*, Dhaka (30 Jan 2013), Front page; 'Fire at Garment Factory' *The Daily Star*, Dhaka (27 Jan 2013), Front page.

⁷ 'EU Worried - Nationwide Factory Inspection Begins', *The Daily Star*, Dhaka (31 Jan 13), Front page.

⁸ 'Devastating Fire at Mirpur RMG Unit - MD, Addl DIG Among 8 Dead' *The Financial Express*, Dhaka (10 May 2013), First page.

⁹ 'RMG Factory Godown Guttled in Ashulia' *The Financial Express*, Dhaka (14 Jun 2013), Metro.

¹⁰ 'Fire at CEPZ Shoe Factory' *The Financial Express*, Dhaka (1 Jul 2013), metro.

¹¹ 'No Serious Efforts' to Improve Factory Safety' (13 Jul 13) above n 5; Search and recovery efforts are still underway. About four to five thousand workers were in the building at the time of collapse, a total of 2,437 survivors were pulled from the rubble: Rahman Jahangir, 'Hard Lessons from Savar Tragedy' *The Financial Express*, Dhaka (4 May 2013), Editorial.

¹² Zaglul Ahmed Chowdhury, News Analysis - Savar Tragedy: Garment Industry Must be Saved, Phasing Out the Errants, *The Financial Express*, Dhaka (5 May 2013), First page; '45 More Bodies Found, Death Toll Now 550' *The Financial Express*, Dhaka (5 May 2013), First page; '38 More Bodies Recovered, Toll 425 - 32 Unclaimed Bodies Buried at Jurain after DNA Test' *The Financial Express*, Dhaka (3 May 2013), First page; Inam Ahmed '9-Storey Building Caves in - Rescue Races against Time' *The Daily Star*, Dhaka (25 Apr 2013), Front page; Nizam Ahmed, 'Savar Tragedy Triggers Outcry Worldwide -RMG Exports Likely to be Affected' *The Financial Express*, Dhaka (26 Apr 2013), First page.

¹³ Ali Iman Majumdar, 'Public Administration - It's Time to Wake up' *The Prothom Alo*, Dhaka (26 Apr 2013), First page. Mr Majumdar was a Cabinet Secretary to the Government of Bangladesh.

factories alone in Bangladesh from 1990 to 2012.¹⁴ Ironically, all went unpunished.¹⁵ It is now widely believed that the recurrence of this sort of tragedy could have been prevented had the wrongdoers been adequately punished.¹⁶

Right to life is the nucleus of all human rights regardless of any boundaries. But workers' lives in Bangladesh seem to be extremely cheap as the government appears to be complacent by offering a small amount of money to the helpless families of victims in response to employers' failure to ensure their safety at the workplace.

Admittedly, criminal liability has the potential to help promote a culture of safety at the workplace.¹⁷ Therefore, it is argued that a precedent of adequate punishment needs to be established, otherwise the law will be continually flouted by profit-hungry garments owners with impunity.¹⁸ While the legal analysis of corporate manslaughter liability under general criminal law would be the task of another article, this piece aims to examine offences of Tazreen as a company, its owner/managing director (the same person, hereinafter MD) and other officers (mid-level managers) for the aforesaid fire casualties under the occupational health and safety (OHS) legislation as a case study. It finds that although the provisions of OHS offences should have been an effective deterrent and a useful instrument to redress violations of workers' safety, that is not the case in practice as their effectiveness is circumscribed by ambiguities in imposing liabilities and inadequacy in the prescribed penalties. There has been no record of successful prosecution of workplace fatalities in Bangladesh.¹⁹ A desired outcome of any law entails clarity in liability and severity in punishment proportionate to the harm caused by, and the gravity of, the offensive conduct. This article thus examines the loopholes in the existing liability and penalty provisions, and provides suggestions for their further improvement. The following section highlights the obligation of the government to protect human lives in Bangladesh.

B. Right to Life and Workers' Right to OHS - a Fundamental Human Right in Bangladesh

The denial of the right to life may render all other human rights worthless in that, enjoyment of any right requires a person to be alive. The right to life is an internationally recognised human right as it is incorporated in both the *Universal Declaration of Human Rights 1948* and the *International Covenant on Civil and Political Rights 1966* (ICCPR). Art 3 of the UDHR declares that '[e]veryone has the right to life, liberty and security of person' It is subsequently included in the ICCPR under Art 6(1) which provides that '[e]very human being has the inherent right to life. This right shall be protected by law....'

¹⁴ 'EU Worried - Nationwide Factory Inspection Begins' *The Daily Star* (31 Jan 2013), Front page.

¹⁵ Mahmudur Rahman et al, 'Garments Owners Never Punished' *The Prothom Alo*, Dhaka (27 Apr 2013); Golam Mortuza, Pranab Bal & Mithun Chowdhury, 'So Many Loss of Lives- But No One Punished' *The Prothom Alo*, Dhaka (1 Dec 2012), Front page.

¹⁶ Sajjadur Rahman, 'Costly Neglect - Govt Sits 11 Years on HC Directive to Ensure Garment Workers' Safety; BGMEA Unaware of It; Top Buyers too Dodge Global Initiative for Safety' *The Daily Star*, Dhaka (29 Nov 2012), Front page.

¹⁷ David Brown et al, *Criminal Laws - Materials and Commentaries on Criminal Law and Process of New South Wales* (5th ed, 2011), 477.

¹⁸ 'Confusion over Tazreen Toll' *The Daily Star*, Dhaka (9 Dec 2012), Front page.

¹⁹ Mortuza et al (1 Dec 12) above 15.

Bangladesh is a state party to most of the major international human rights instruments including the ICCPR.²⁰ As a member state, Bangladesh is obliged under Art 2 of the ICCPR to 'adopt such legislative or other measures as may be necessary to give effect to the rights recognised by the Covenant'. In addition to this international obligation to protect human lives, the Government of Bangladesh has assumed further responsibility to protect this right under its Constitution which embraces most of the rights contained in the UDHR including the right to life as a fundamental right of the people.

Article 32 of the Constitution provides that 'no person shall be deprived of life or personal liberty save in accordance with law'. This right is reinforced by the corresponding right to protection of law enshrined in Art 31 of the Constitution, which states that every person in Bangladesh has an inalienable right to enjoy the protection of the law as well as to be treated in accordance with law, and only in accordance with law.²¹ The High Court Division of the Supreme Court of Bangladesh firmly held in *Gias Uddin v Dhaka Municipal Corporation and Others* that the protection of life under Art 31 of the Constitution means that one's life cannot be endangered by any action which is illegal.²² In *Shibu Pada Acharjee v State* the Supreme Court of Bangladesh held with great emphasis for the right to life that the perpetrator of violating this right should receive serious punishment so that justice is done for the victim and the society.²³ The Constitution also guarantees equality before the law under Art 27 which provides that '[a]ll citizens are equal before law and are entitled to equal protection of law. Giving emphasis to the enjoyment of fundamental rights, the abovementioned Supreme Court further pronounced in *State v Deputy Commissioner Satkhira and Others* that, it is the constitutional responsibility of the court to ensure that the fundamental rights of the citizens are preserved and strictly protected.²⁴

Inviolability is perhaps the most important feature of fundamental rights as they cannot be taken away by the state under ordinary legislation because of the supremacy of the constitutional law.²⁵ Art 7(2) of the Constitution unequivocally declares its supremacy against any other law of the land. In recognition of the superiority of fundamental rights, the US Supreme Court in *Boyd and Others v United States* held long ago that '[i]t is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon'.²⁶

In addition to the right to life, workers' right to OHS is enshrined as a human right in Art 7 of the *International Covenant on Economic, Social and Cultural Rights 1966* (ICESCR). Article 7 provides that '[t]he States Parties to the present Covenant recognize the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular... (b)

²⁰ Bangladesh ratified the ICCPR on 6 September 2000.

²¹ 'Right to protection of law -To enjoy the protection of the law, and to be treated in accordance with law, and only in accordance with law, is the inalienable right of every citizen, wherever he may be, and of every other person for the time being within Bangladesh, and in particular no action detrimental to the life, liberty, body, reputation or property of any person shall be taken except in accordance with law': Art 31 of the Constitution.

²² (1997) 17 BLD (HCD) 577.

²³ (2004) 56 DLR (HCD) 285.

²⁴ (1994) 14 BLD (HCD) 266.

²⁵ David A J Richards, *The Moral Criticism of Law* (Dickenson Publishing, 1977), 39–56; David A J Richards, 'Sexual Autonomy and the Constitutional Right to Privacy: A Case Study in Human Rights and the Unwritten Constitution' (1978–1979) 30 *Hastings Law Journal* 957, 958. See also Paul Brest, 'The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship' (1981) 90 *Yale Law Journal* 1063, 1075.

²⁶ 116 US 616, 635 (1886) per Justice Bradley as quoted in William J Brennan, Jr, 'State Constitutions and the Protection of Individual Rights' (1977) 90 *Harvard Law Review* 489, 494.

Safe and healthy working conditions. Bangladesh has ratified the ICESCR. Further, the right to OHS is also recognised as a core human right under two ILO conventions titled the *Convention on Occupational Safety and Health 1981*, and the *Promotional Framework for Occupational Safety and Health Convention 2006*. Although Bangladesh has not ratified these ILO conventions as yet, it is a signatory to both instruments.

The above discussion demonstrates that the right to life is a human right as well as a fundamental right in Bangladesh, and the state is obliged to protect this right and ensure equal protection of the law for every citizen treating everyone equal before the law. Therefore, it would be a breach of this sacred obligation of the state if the persons responsible for factory fires are not brought to justice.²⁷ Section C demonstrates how the right to life was violated at Tazreen.

C. Facts of the Tazreen Fire

The Tazreen tragedy took place in a factory where about 1,150 people were working that night, the fire alarm went off, and two managers blocked the way to run towards staircases asking the workers to stay in work.²⁸ The ordinary exit gates of the nine-storey building were locked at the time of the blaze concealing the last opportunity for the panicky workers to escape the trap of death.²⁹ Perhaps more shockingly, Tazreen had no emergency fire exit, therefore the workers who desperately tried to flee from the flame could not get out of it.³⁰ Besides the lack of emergency or fire exits, the building's three staircases ended in the ground floor inside the building. The ground floor had been used as a store or warehouse stacking huge quantity of garment materials where the fire originated,³¹ which made the exit even more difficult, if not impossible. The warehouse was unauthorised, and the fire services authority admits that 'none of the three staircases at Tazreen was fire protected as required by safety law'.³² Moreover, 'fire extinguishers were left unused as none knew how to use them, or were dysfunctional.'³³

The factory is located in Nischintapur village within the Ashulia Industrial Area which is placed outside Dhaka. Hundreds of factory buildings including Tazreen have been erected there in violation of the national building code and the master plan of the capital city (The Dhaka Metropolitan Development Plan - DMDP) which does not permit construction of factories in the 'so-called' Ashulia industrial district.³⁴ This area had been brought under the control of Rajuk (Capital Development Authority) in 1987 and subsequently within the DMDP in 1997.³⁵ Despite being obligatory for the owners of these factories, they had

²⁷ In addition to the right to life, the right to health is also both a human right as well as a fundamental right in Bangladesh as recognised by its Constitution and international human rights instruments: see Md Ershadul Karim, 'Health and Human Rights under the National and International Legal Framework: Bangladesh Perspective' (2010) 3 *Journal of East Asia & International Law* 337.

²⁸ 'Fire Revealed a Gap in Safety for Global Brands' *The Daily Star*, Dhaka (8 Dec 2012), Front page.

²⁹ 'Tazreen Fire: Our Share of Corporate Criminality' *The Financial Express*, Dhaka (5 Dec 12), Editorial.

³⁰ M Shahidul Islam, 'Conspiracy Theory Lacks Credibility - Deadly Garment Fire Shakes Buyers' Confidence' *The Weekly Holiday*, Dhaka (30 Nov 2012), Front page.

³¹ Abdur Rahman Khan, 'Garments Tragedy Raises Many Questions about Workers' Safety in Bangladesh', *The Weekly Holiday*, Dhaka (30 Nov 2012), Metropolitan.

³² Tawfique Ali, 'Ashulia Industrial Area Factories Set up Violating Rules' *The Daily Star*, Dhaka (22 Dec 2012), Front page.

³³ Islam (30 Nov12), above n 30.

³⁴ Ali (22 Dec12), above n 32.

³⁵ Ibid.

obtained neither the land-use clearance nor the building approval from Rajuk.³⁶ Evidently, the Tazreen building was constructed on a narrow pathway in the village without Rajuk's approval as confirmed by concerned officials.³⁷ In addition, as asserted by the president of the Institute of Architects Bangladesh, 'the mandatory safety provisions as per the national building code and construction rules had been grossly violated there'.³⁸ According to the national building code, a high-rise building like Tazreen (9-storey) is required to have safety compliances which include emergency exits, fire-resistant doors, dedicated water reservoirs for fighting fire, easy access to fire engines and alternative power supply, etc. Paradoxically, Tazreen building lacked all of these mandatory facilities.³⁹

Tazreen factory was originally started off in a 'three-storey building' in 2008 when the fire department first issued a licence. However, they kept renewing the licence on a regular basis until June 2012 despite the fact that, the owner of the factory kept extending the building illegally.⁴⁰ The Deputy Director of Fire Services confirms that the Tazreen owner extended the factory building up to the ninth floor without complying with necessary fire safety measures.⁴¹ Thus the president of the Institute of Architects Bangladesh logically blamed the sheer negligence of the concerned regulatory agencies and lack of supervision.⁴²

In such a perilous situation, MD reportedly said that 'I'm concerned that my business with them [foreign importers] will be hampered'.⁴³ However, in another statement the owner has admitted that it was his fault and nobody informed him of the lack of emergency exits which could be made accessible from outside.⁴⁴

The Tazreen fire exposes deliberate violations of, and absolute disregard for, the law of the land. Both the MD as well as the governmental agencies disobeyed or at least ignored the legal requirements allegedly relying on corruption.⁴⁵ The owners are believed to put their profits above workers' safety as they sometimes discourage workers from taking part even in monthly fire drills as it 'would cost them production losses'.⁴⁶ As will be discussed below, the rules currently in place require the factories to ensure safety of their workers. But this sort of tragic accident recurrently happens due to the negligence or recklessness of owners and executives of factories in adhering to workplace safety and the failure of regulators in enforcing the relevant laws.⁴⁷ It is reported that two dozens of licences manifestly failed 'to ensure improved workplace condition as unscrupulous govt staffs join hands with errant factory owners'.⁴⁸ The people involved with the industry say that 'rampant corruption by

³⁶ Ibid.

³⁷ Ibid.

³⁸ Ibid.

³⁹ Ibid.

⁴⁰ Ali (30 Jan 13) above n 6.

⁴¹ Ibid.

⁴² Ali (22 Dec 12), above n 32. However, the liabilities of regulatory authorities fall beyond the scope of this article and their failure may not affect the liability of the company and its executives, in any way.

⁴³ Islam (30 Nov 12), above n 30.

It may be noted that Tazreen was making garments for the US largest retailer 'Walmart'.

⁴⁴ Refayet Ullah Mirdha & Sarwar A Chowdhury, 'My Fault, but None Alerted Me - Tazreen MD Tells Star' *The Daily Star*, Dhaka (29 Nov 2012), Front page.

⁴⁵ 'Safety Gets Risky for Corruption' *The Daily Star*, Dhaka (7 Dec 2012), Front page; 'Safety at RMG Units - Europe for Dhaka to Make Tougher Laws' *The Daily Star*, Dhaka (18 Jan 2013), Front page; Janet Keeping & Iftekharuzzaman, 'Tazreen Fire, Corruption and Rule of Law - Lessons for Canadians' *The Daily Star*, Dhaka (22 Dec 2012), Op-Ed.

⁴⁶ 'Safety Gets Risky' (7 Dec 12) *ibid.*

⁴⁷ Ibid.

⁴⁸ Ibid.

regulators and factory owners' "greed" for excessive profit lead to many such accidents' and a director of another garments factory categorically claims that 'factory owners without having to put in place any safety measures can get licences from the government authorities in exchange for bribes'.⁴⁹ There are obvious corrupt practices and regulatory failures which fall beyond the scope of this article.

The Tazreen incident is comparable only with the 1911 fire at Triangle Shirtwaist Factory in New York City which killed 146 people.⁵⁰ The historic Triangle Shirtwaist Factory incident had contributed to bring about significant changes in the US workplace.⁵¹ The government of Bangladesh is currently under a tremendous pressure from big importers such as the United States, European Union and ILO to make legal reforms in order to ensure safety at work.⁵² A failure of Bangladesh in effectively responding to the demand of improving, amongst other things, health and safety conditions at the workplace may result in permanent suspension of GSP for the job-hungry country by many developed nations. Garments industry is made up of more than 4,000 units which constitute the single largest sector of export earnings worth over US\$20 billion annually and accounts for over 10 per cent of the national GDP.⁵³ Bangladesh is already overstrained by unemployment and cannot afford to lose the garments industry which is a driving force of the national economy and workplace of about four million workers, 90% of whom are women in the country.⁵⁴ Therefore, in the wake of such pressures and prosecutor's complete failures in convicting errant companies and their executives for frequent factory fires in the past, it is crucial to conduct an in-depth analysis of the prevailing legal provisions concerning workplace safety in Bangladesh in order to explore the potential liability of the company and its executives for such fatalities.

This investigation focuses on the provisions of the workplace safety legislation called the *Bangladesh Labour Act 2006* (BLA2006) which will be looked through the prism of the *Work Health and Safety Act 2011* (NSW) (WHS2011). In Australia, all jurisdictions have replaced their previous health and safety legislation with a new enactment embodying the *Model Work Health and Safety Act 2009* from the beginning of 2012.⁵⁵ Accordingly, NSW parliament (NSW is the first and most populous state of Australia), has enacted the WHS2011 giving from 1 January 2012.⁵⁶ This new legislation has been put in place as an outcome of harmonisation of WHS laws throughout Australia including the Commonwealth jurisdiction aiming at achieving a consistent and coherent regulatory approach across all Australian jurisdictions. Hence the WHS2011 of NSW will be used in this article as the law of Australia in discussing the relevant provisions of the BLA2006 where necessary and appropriate, though the legislation of other Australian jurisdictions may slightly vary.

⁴⁹ Ibid.

⁵⁰ 'Mozena for Quick Safety Measures in GMG Factories, Warns of Losing GSP in Failure' *The Weekly Holiday*, Dhaka (7 Dec 2012), Business. It cited the US Ambassador to Bangladesh Mr Dan Mozena.

⁵¹ Ibid.

⁵² As mentioned earlier, the US has already suspended GSP advantage for Bangladesh. See also 'Safety Accord Framework for Garments Industry' *The Financial Express*, Dhaka (1 Aug 2013) editorial; 'BD Labour Law Amendments - ILO for Further Steps to Fulfil Obligations' *The Financial Express*, Dhaka (23 Jul 2013) first page.

⁵³ Islam (30 Nov 12), above n 30.

⁵⁴ Md Zonaed Emran, 'The Rana Plaza Tragedy' *The Financial Express*, Dhaka (4 May 2013), Feature & Analysis.

⁵⁵ For details about this harmonisation, 'Work Health & Safety – Guidance and Resources' http://www.comcare.gov.au/WHs/guidance_and_resources (31 March 2013); Karen Wheelwright, 'Company Directors' Liability for Workplace Deaths' (2011) 35 *Criminal Law Journal* 223, 233-34.

⁵⁶ The previous *Occupational Health and Safety Act 2000* (NSW) was repealed by sec 276C of the *Work Health and Safety Act 2011* (NSW).

D. Occupational Health and Safety Requirements - Statutory Offences under Health and Safety Legislation in Bangladesh and Australia

The area of occupational health and safety is regulated primarily by the BLA2006 in Bangladesh. Broadly, Part 6 of the BLA2006 contains provisions for safety of workers in which s62 deals with the measures to be taken by a factory to avoid dangers and damages that may be inflicted by fire. Section 62 requires a factory to have the following:

- i. At least one alternative exit with staircases connecting all the floors of the factory building as described in the rules for each and every factory.
- ii. No door affording exit can be locked or fastened during the working hours so that they can be easily or immediately opened from inside.
- iii. The doors affording exit must be open outwards, unless it is sliding in nature, if the door is between two rooms it must open in the direction of the nearest exit.
- iv. Marking in red letter in proper size, in the language understood by the majority of the workers, on such doors, windows or any alternative exit affording means of escape in case of fire.
- v. There shall be an effective and clearly audible means of fire-warning system to every worker.
- vi. There shall be a free passage-way giving access to each means to escape.
- vii. Where more than ten workers are employed other than in the ground floor, there shall be a training for all the workers about the means of escape in case of fire.
- viii. There shall be at least one fire-extinction parade and escape-drill at least once a year in a factory where more than fifty workers are employed.

It is worthwhile mentioning that that some minor changes have been made in s62 by the *Bangladesh Labour (Amendment) Act 2013* passed on 15 July 2013. These changes are not included here mainly because they have rather widened the safety duties to some extent, but they will not retrospectively apply to the Tazreen fire. Therefore those changes are unrelated to this study.

The duties imposed under s62 are straightforward and mandatory. Admittedly, an obvious purpose of these legal duties is to protect the people from fire at work. An accident may occur despite strict compliance with regulation, but casualties can be minimised by such obedience which entails due diligence exercise by employers and factory executives. The facts of the Tazreen fire stated above do provide compelling evidence that the factory was in gross violation of s62 of the BLA2006. This is so because, the building itself was constructed without proper authorisation, it did not have any alternative safe exits, an unauthorised warehouse was established in the ground floor where the fire originated, employees were not imparted training as to how effectively respond to factory fires and so on. Even more distressingly, all the staircases of the illegally erected nine-storey Tazreen building ended inside the ground floor and the main collapsible gates were deliberately locked-up after the eruption of fire perhaps to protect the products from being stolen.

Evidently, comprehensive duties concerning safety from fire are laid down in s62 of the BLA2006, but it does not explicitly clarify who owes those duties and to whom. However, in its preface, the legislation does mention that it is enacted to regulate the relationships between employers (owners) and their employees of any form of business. In addition to criminal liability, s150 of the BLA2006 makes the owner civilly liable to pay compensation to injured workers for breaching the same duties under s62. So, it can be inferred that the duties are

primarily imposed on the 'owner/employer' in control of the establishment.⁵⁷ This ambiguity may impede the enforcement of the legislation, and therefore can be inhibitive to achieving its purposes. This issue will be further discussed later while discussing persons who can be held criminally responsible.

Unlike the BLA2006, the WHSA2011 imposes statutory duties on several persons ranging from the entity to its workers including officers to do all that is 'reasonably practicable' to ensure a safe and healthy work environment at work.⁵⁸ The central requirement of these duties is that one should take reasonable care to protect oneself and others at work, and officers have the duty to 'exercise due diligence to ensure that the person conducting the business or undertaking complies with that duty or obligation'. So, the WHSA2011 explicitly places duty not only on the business entity, but on everyone who can be hurt or injured at work or die from workplace accident. Although the BLA2006 lacks such clarity, if the offence is committed by a company or any other business establishment, all people concerned are liable unless they prove their innocence under s312 of the BLA2006. Section 312 provides that:

When an offence punishable under this Act or under any other rule, regulation or scheme thereunder committed by a company or other body corporate or by a firm, every director, partner, manager, secretary or other officer or agent thereof shall, if actively concerned in the conduct of the business of such company, body corporate or firm, be deemed to have committed the offence unless he/she proves that the offence was committed without his/her knowledge or consent, or that he/she exercised all due diligence to prevent the commission of the offence.

The difficulty in not placing duty on directors and officers independently of the business establishment is that, to punish the individual(s) whose act or omission has caused the fatalities could not be held liable unless the liability of the entity itself is proved. The breach of the safety duty is not per se an offence under the BLA2006, therefore it is difficult to accuse the company itself of breach of the duty. If all breaches are to be attributed to the entity, businesses may be burdened too heavily. On the other hand, no duty has been imposed on individuals, so no question of breach by them may arise. It would not be always easy to prove the liability of the company by applying the directing mind doctrine as applied in *Tesco Supermarkets Ltd v Natrass*⁵⁹ and more recently in *Transco PLC v Her Majesty's Advocate*.⁶⁰

Even after the proof of the entity's offence, individuals' liability is subject to subjective mens rea (knowledge or consent) and due diligence defences that make the burden of proof of their guilt even more onerous for the prosecution. To make the BLA2006 useful, duty should be imposed on all the businesses, their officers and workers corresponding to the provisions of the WHSA2011. It should be mentioned that, the contractual duty may extend even beyond the contractual relationships when it comes to an issue involving health and safety of people. Although the contractual duty of an employee is primarily owed to the employer, the former may be personally liable for the breach of the duty resulting in deaths or injuries of human beings. For example, Pittwood was a gatekeeper at a railway level crossing and he failed to keep the gate shut. A train collided with a horse and cart resulting in the death of the train driver. Pittwood was found liable for the death caused by his failure to observe his

⁵⁷ Section 2(49) of the BLA2006 provides meaning of the term 'owner' which includes employer and manager, amongst others.

⁵⁸ See ss 27-29 of the WHSA2011.

⁵⁹ [1972] AC 153.

⁶⁰ (2004) SCCR 1. A detailed discussion of the directing mind theory falls beyond the scope of this article.

contractual duty to keep the gate closed.⁶¹ While the defence counsel in *R v Pittwood* argued that the defendant owed duty of care to his employer, rather than to the victim, the Court held that it makes no difference whether the contractual duty of care is owed to the employer or to the victim, the existence of a such a duty can be a sufficient basis for criminal liability for omission demonstrating gross and culpable negligence.⁶² Nonetheless, an explicit statutory duty for everyone would be helpful in Bangladesh in the absence of well developed body of case law.

E. Offences under the Health and Safety Legislation

There are three offences concerning health and safety issues that can be connected with a factory fire under s309 of the BLA2006. These offences are committed if there is: a breach causing death, a breach causing serious bodily harm and a breach causing bodily injury or other harm. Hence, all offences are related to a specific consequence of a disputed breach of law, but a breach per se without a consequence may not be prosecutable. Although the legislation has a direct provision regarding death of workers at work, it does not impose liability for homicide by itself, rather it is a regulatory offence of penalties that are much lower than those of 'culpable homicide', a phrase used in the penal law of Bangladesh for the word 'manslaughter' as called in many other jurisdictions such as Australia and the United Kingdom (except Scotland).⁶³

Unlike the BLA2006, the WHSA2011 contains three categories of offences (ss31, 32 and 33) that can be committed by a person who has a 'health and safety duty' placed under s30.

All of the three sections impose liability on persons who have a health and safety duty owed to the victim. Describing the duty, s30 of the WHSA2011 states that '*health and safety duty*' means a duty imposed under Division 2, 3 or 4 of this Part (Part 2 of the WHSA2011). Section 19 in Division 2 defines the 'primary duty of care' which is imposed on a person conducting business or undertaking. It provides that the person 'must ensure, so far as is reasonably practicable, the health and safety of', amongst others, workers. More specifically, s19(3) asserts that the person 'must ensure, so far as is reasonably practicable ... a work environment without risks to health and safety' and 'the provision and maintenance of safe plant and structures' and 'the provision and maintenance of safe systems of work'. Interestingly, s19(5) requires the self-employer to ensure his/her own safety at work. Section 20 is concerned with further duty of the person involving management or control of a workplace. Section 20(2) provides that '[t]he person with management or control of a workplace [in whole or in part, of the workplace]⁶⁴ must ensure, so far as is reasonably practicable, that the workplace, the means of entering and exiting the workplace and anything arising from the workplace are without risks to the health and safety of any person.' The liability is of strict which allows a single defence of 'reasonably practicable'. Section 18 provides the meaning of 'reasonably practicable' in ensuring health and safety. It reads as follows:

⁶¹ *R v Pittwood* (1902) 19 TLR 37.

⁶² (1902) 19 TLR 37, 38.

⁶³ In Bangladesh, the maximum penalty for a culpable homicide which is meant to be equivalent to manslaughter in NSW is imprisonment for life under s304 of the *Penal Code* 1860.

⁶⁴ As defined in s20(1) of the WHSA2011.

In this Act, *reasonably practicable*, in relation to a duty to ensure health and safety, means that which is, or was at a particular time, reasonably able to be done in relation to ensuring health and safety, taking into account and weighing up all relevant matters including:

- (a) the likelihood of the hazard or the risk concerned occurring, and
- (b) the degree of harm that might result from the hazard or the risk, and
- (c) what the person concerned knows, or ought reasonably to know, about:
 - (i) the hazard or the risk, and
 - (ii) ways of eliminating or minimising the risk, and
- (d) the availability and suitability of ways to eliminate or minimise the risk, and
- (e) after assessing the extent of the risk and the available ways of eliminating or minimising the risk, the cost associated with available ways of eliminating or minimising the risk, including whether the cost is grossly disproportionate to the risk.

The above description of the meaning of the defence *reasonably practicable*, precisely suggests that a person must do everything reasonably possible to avoid or at least minimise any potential risk to health and safety of workers at work. Notably, the WHSA2011 requires a self-employer to ensure his/her own health and safety. This implies the profound importance of ensuring health and safety at the workplace.

While all offences in the WHSA2011 are duty-based unlike those in the BLA2006 that are consequence-based, Category 1 and Category 2 offences are fault based offences, whereas, Category 3 offences are of 'standard' absolute liability,⁶⁵ which requires the prosecution to prove only the conduct element that the person had a health and safety duty, and that the person failed to comply with that duty. Hence, there is no indication of any sort of risk required to be caused by Category 3. These two requirements (having health and safety duty, and failure to comply with that duty) are common in all three categories. In addition to the Category 3 requirements, Category 2 offences stated in s32 require that 'the failure exposes an individual to a risk of death or serious injury or illness'. Therefore, a causal link between the failure in performing the duty and resultant exposure of someone to a designated risk is essential. Although s32 offences have been argued to be fault based,⁶⁶ it may also be argued that 'causation' and 'fault element' are different as causation is primarily attached to the consequence which is first a component of *actus reus* and no corresponding *mens rea* is required for that causation under s32. From this point of view, the offences under s32 can also be regarded as an absolute liability offence.

The highest offence or the most serious one amongst these three is defined in Category 1 under s31 which requires the prosecution to prove, amongst other things, defendant's 'reckless conduct' in breaching the duty. Section 31 provides that the person having a health and safety duty, 'without reasonable excuse, engages in conduct that exposes an individual to whom that duty is owed to a risk of death or serious injury or illness, and ... the person is reckless as to the risk to an individual of death or serious injury or illness.' Recklessness is a subjective *mens rea* element which 'requires proof of 'foresight of, or advertence to, the consequences of an act as either probable or possible and a willingness to take the risk of the occurrence of those consequences.'⁶⁷ In addition to recklessness, a defence of reasonable excuse is allowed where onus of proof has been imposed on the prosecution. Hence, this is clearly a fault based offence and not a strict liability offence as indicated in s12A of the WHSA2011.

⁶⁵ Wheelwright (2011) above n 55, 233.

⁶⁶ Ibid.

⁶⁷ Wheelwright (2011) above n 55, 234. See also, *The Queen v Crabbe* (1985) 156 CLR 464, 465-72.

The High Court in Australia in *He Kaw Teh v The Queen* has recognised three types of statutory offences: offences involving subjective mens rea element, strict liability offences where no subjective fault element is required to be proved but the defendant can raise a defence of honest and reasonable mistake of fact, and absolute liability offences where no fault element needs to be proved but specific defences incorporated in the statute creating the offence, if there is any, may be established by the defendant on the balance of probability.⁶⁸ The obvious difference between a strict liability offence and an absolute liability offence is that the former allows a single specific defence which is 'honest and reasonable mistake of fact', whereas the latter does not offer such a preset defence; rather it relies on the statute defining the offence with respect to a defence. They also differ in terms of burden of proof as the defendant bears only evidential burden to raise the defence of honest and reasonable mistake of fact, and then the proving or legal burden is shifted to the prosecution to prove beyond reasonable doubt that such a mistake did not exist at the time of committing the offence.⁶⁹ Whereas, in a case of absolute liability, the defendant bears the proving burden for the defences allowed by the statute, if there is any. So, the offence under s31 is not a strict liability offence, rather it is an exception under s12 of the WHSA2011, which provides that all offences are of strict liability unless otherwise stated in the section defining the offence. However, the phrases 'strict liability' and 'absolute liability' are loosely used as synonymous sometimes.

Unlike the offences under the BLA2006, s31 does not require the prosecution to prove any actual loss of life or illness whatsoever, but exposure of someone to such a specified risk is sufficient. However, if a death occurs, bringing a criminal charge under either the WHSA2011 (regulatory offence) or the *Crimes Act 1900* (manslaughter) remains open, and the appropriate action will be decided by the health and safety regulator and the police. Such a laxity has both positive and negative sides. The positive is that this allows prosecution for regulatory offence even without a real harm being caused, while the burden appears too onerous for the prosecution as a regulatory offence (proving reckless conduct, exposure to such a risk, duty owed to an individual worker, and absence of reasonable excuse, which would be its negative facet.

Unlike the WHSA2011, the BLA2006 does not explicitly stipulate the nature of liability it imposes on the businesses. The WHSA2011 categorises the offences in general as of strict liability,⁷⁰ whereas the BLA2006 is silent about it. The common law principles set forth in *He Kaw Teh v The Queen*⁷¹ regarding mens rea requirements and silence of the statute creating the offence presume, that silence does not mean no *mens rea* is required. Rather the relevant mens rea has to be determined by taking into account the wording of the law, nature of the offence such as whether the offence is truly criminal and efficacy of law.⁷² Unlike the offences defined in the general criminal law, the offences created by the BLA2006 are of inherently regulatory nature. Section 312 of the BLA2006 (discussed below) implies that the offences are of absolute liability in that it contains a deeming provision for all directors, managers and other officers who were actively engaged in the business of the entity at the time of violation of the law by the entity itself. Section 312 makes all of them liable unless he/she proves that the offence was committed without his/her knowledge or consent, or that

⁶⁸ (1985) 157 CLR 523 as cited in Simon Bronitt & Bernadette McSherry, *Principles of Criminal Law* (Lawbook Co, 2nd ed, 2005), 187.

⁶⁹ *He Kaw Teh* (1985) 157 CLR 523, See also *Proudman v Dayman* (1941) 67 CLR 536.

⁷⁰ Section 12A of the WHSA2011.

⁷¹ (1985) 157 CLR 523.

⁷² See for details *He Kaw Teh v The Queen* (1985) 157 CLR 523.

he/she exercised all due diligence to prevent the commission of the offence. As currently worded, s 312 does not require the prosecution to prove any subjective *mens rea* element. Rather it provides statutory defences to individuals to prove their innocence, and departing from the golden thread of criminal law, it overtly places onus of proof on the defendants themselves. Further, penalties are not truly severe (discussed below) compared to the consequence of the offence, and the law may lose its efficacy if subjective *mens rea* is presumed to exist. All this clearly resembles the character of a standard of absolute liability offence as decided by the High Court of Australia in *He Kaw Teh v The Queen*.⁷³ So, the liability of individuals under the BLA2006 is arguably absolute.

Regarding due diligence defence under s312 of the BLA2006, a statutory meaning of the defence can be helpful and it can be borrowed from the WHSA2011. Describing the duties of officers, s27(5) of the WHSA2011 provides that 'due diligence' includes taking reasonable steps:

- (a) to acquire and keep up-to-date knowledge of work health and safety matters, and
- (b) to gain an understanding of the nature of the operations of the business or undertaking of the person conducting the business or undertaking and generally of the hazards and risks associated with those operations, and
- (c) to ensure that the person conducting the business or undertaking has available for use, and uses, appropriate resources and processes to eliminate or minimise risks to health and safety from work carried out as part of the conduct of the business or undertaking, and
- (d) to ensure that the person conducting the business or undertaking has appropriate processes for receiving and considering information regarding incidents, hazards and risks and responding in a timely way to that information, and
- (e) to ensure that the person conducting the business or undertaking has, and implements, processes for complying with any duty or obligation of the person conducting the business or undertaking under this Act.

It adds some examples for s27(5)(e) and provides that:

For the purposes of paragraph (e), the duties or obligations under this Act of a person conducting a business or undertaking may include: reporting notifiable incidents, consulting with workers, ensuring compliance with notices issued under this Act, ensuring the provision of training and instruction to workers about work health and safety, ensuring that health and safety representatives receive their entitlements to training.

It is to be noted that under s27(1) of the WHSA201 an officer owes duty to the company, however, s27(4) provides that an officer can be convicted regardless of conviction of entity in relation to the duty.⁷⁴ This is confusing for which it has been recommended that a deeming provision, that officers shall be deemed to have a duty to individual workers, may help remove this confusion.⁷⁵ The BLA2006 is unclear whether the duty is owed to the company or individual workers. It is submitted that for the purposes of health and safety regulation, officers should owe duty to individual workers, otherwise the basis of their conviction may

⁷³ (1985) 157 CLR 523 as cited in Bronitt et al (2005), above n 68, 187.

⁷⁴ Section 27(4) reads as follows: An officer of a person conducting a business or undertaking may be convicted or found guilty of an offence under this Act relating to a duty under this section whether or not the person conducting the business or undertaking has been convicted or found guilty of an offence under this Act relating to the duty or obligation.

⁷⁵ Wheelwright (2011) above n 55, 234.

be sometimes questionable and unjustified in that proving breach of duty may be difficult. Moreover, in the absence of clear statutory provisions, the applicable law may be common law in which the duty of care is owed by the company itself and not by its managers or directors as held in *Salomon v Salomon & Co*, and it was reaffirmed by the HC of Australia in the context of workplace safety in *Andar Transport Pty Ltd v Brambles Ltd*.⁷⁶ Therefore, officers' duty of care to workers should be statutorily imposed on them.

F. Who Can be Held Liable

The BLA2006 does not clearly identify the persons who are responsible, nor does it use the terms 'company/corporation' or partnership. However, its coverage seems to be very wide in that it encompasses all forms of businesses. It imposes obligation on a business 'establishment' to ensure health and safety of workers. An establishment includes 'any shop, commercial establishment, industrial establishment, or houses or premises where workers are employed for running an industry'.⁷⁷ This section is quite similar to s5 of the WHSA2011 which imposes obligation on 'a person conducting a business or undertaking' and such a person includes all types of business organisations excluding volunteer associations. Although it does not identify by name, it is clear that in both jurisdictions, regardless of the form of a particular business, every business falls within the scope of statutory regulation in respect of ensuring health and safety at work.

Unlike ss31-33 of the WHSA2011, s62 of the BLA2006 does not mention anything about who owes the duty of care and to whom as mentioned earlier. However, there is mention of 'owner' of a business establishment in s62(2) that 'if noncompliance is found by an inspector he/she must serve a written notice on the owner advising what needs to be done with a stipulated time'. Consistently, s62(8) also imposes responsibility on the owner by requiring 'maintenance of a record of mock fire fighting at least once a year by the owner'. In the absence of a clear indication, these mentions of the word 'owner' imply that s62 imposes liability on the owner of the business regardless of its particular form (company, partnership, sole trader etc). This inference is reaffirmed by some other sections of the BLA2006. Section 2(49) provides a meaning of 'owner' for the purposes of BLA2006. It provides a comprehensive list of persons who will be regarded as the owner of a business establishment. The list includes, amongst others, a person who employs workers for the establishment and his/her heirs, managers of the business or any person who is responsible for the management of the business, and the possessor or directors or managers where the premises is possessed by a person other than its owner. Section 2(31) provides the meaning of 'establishment' which includes any shops, commercial establishments, industrial establishment or any premises where workers are employed to run an industry. Section 312 of the BLA2006 provides further clarification about the persons responsible for an offence committed by a company. It says that, if a company or a firm is held liable for an offence under the BLA2006 or any rules, regulations or scheme made thereunder, every director, partner, manager, secretary or other officer and agent thereof shall, if actively engaged in its business, be deemed to have committed the offence, unless he/she proves that the offence was committed without his/her knowledge or consent, or that he/she exercised all due diligence to prevent the commission of the offence. Furthermore, s309 of the BLA2006 states that notwithstanding anything contained elsewhere in Chapter 19 of the BLA2006 which incorporates the provisions regarding crimes, penalties and procedure, if 'any person' contravenes any provisions of the BLA2006 or any rules, regulations, or scheme made thereunder, shall be

⁷⁶ Wheelwright (2011), above n 55, 227.

⁷⁷ The *Labour Act 2006*, s2(31).

punishable with penalties based on the consequence of the contravention as described in the section (details are discussed below in the penalty section). Section 309 mentions the term 'person' without providing any clarification about its meaning. However, from the above description of the statutory meaning of different terms used in imposing or defining liability and prescribing penalties under this legislation, it is obvious that the word 'person' mentioned in s309 encompasses all natural persons and all types of commercial or industrial establishments.⁷⁸ Hence, a company like Tazreen and its MD and mid-level managers who blocked the door do fall within the scope of the duties and penalties at hand. Providing greater clarity, ss31, 32 and 33 of the WHSA2011 vividly state that both individuals and entities can be held liable for breaching the health and safety duty as discussed above.

As alluded to earlier, facts of the Tazreen fire unequivocally suggest that the company has manifestly violated the requirements set forth in s62 of the BLA2006 by its failure to ensure safe environment at the workplace. In an OHS case, the Supreme Court of Victoria in *DPP v Esso Australia Pty Ltd* imposed a fine of AU\$ two million on the company for two failures that include failure to conduct hazard identification and failure to adequately train employees about risks.⁷⁹ The House of Lords in *R v Miller* held that an accused of homicide may also be found liable for 'failing to take measures that lie within one's power to counteract a danger that one has oneself created'.⁸⁰ In relation to OHS, a corporation can be convicted for both an overt and a covert or latent failure.⁸¹ Covert or latent failures are defined as being design failures, insufficient training, and inadequate supervision.⁸²

As the company itself has failed to comply with the requirements, it makes the owner/MD and mid-level managers criminally liable under s312 of the BLA2006 as they all were actively engaged in its business. In addition, the noncompliance discussed earlier was irrefutably known to the MD, and mid-level managers shut the doors and prevented the panicked workers from running away from their rooms. Arguably, they all can be held liable for their wrongful action under s62 and s309 which prescribes punishment for whoever contravenes any provision of this legislation or any rules or regulations made thereunder. The fire has caused serious casualties and the evidence of breach of safety duty is obvious. Therefore, they can be punishable under s309 of the BLA2006. Although individuals' liability are subject to a specific defences as stated earlier, given the blatant breaches of the duty apparently without any valid defence, they all are likely to be found guilty.⁸³ However, further clarity of law in relation to safety duty and the liability arising from a breach of that duty is desirable to facilitate smooth enforcement of the law and enhancing its deterrent effects.

G. Penalties of the Offences under the Health and Safety Legislation in Bangladesh

⁷⁸ It should be noted that s309(3) provides that nothing in this section shall apply to any contravention of the BLA2006 or any rules, regulations or scheme made thereunder for which a higher penalty is available. The *Penal Code 1860* (Bangladesh) does provides a higher penalty, but it would be difficult to prove their guilty under the general criminal law.

⁷⁹ [2001] VSC 263. 124 A Crim R 200; Brown et al (2011) above n 17, 477.

⁸⁰ [1983] 2 AC 161, 176.

⁸¹ See Celia Wells, Derek Morgan and Oliver Quick, 'Disasters: A Challenge for the Law' (2000) 39 *Washburn Law Journal* 496, 499-501.

⁸² James Reason, *Managing the Risks of Organisational Accidents* (Ashgate Publishing, 1997), 10.

⁸³ In addition to the company itself and its executives, the licencing authorities who granted licences without having to check the legal requirements, inspection authorities who bear the responsibility for checking the compliance with safety requirements may also be held liable for their negligence, but their liability falls beyond the scope of this article as mentioned earlier.

As mentioned previously, s309 of the BLA2006 sets out punishments for contraventions of any provisions of the BLA2006 or bylaws made there-under. The punishments provided in s309(1) are directly connected with the consequences of violations, and no punishment has been prescribed for the non-compliance per se.

The maximum penalty for the highest offences where violations results in death is four years' imprisonment, or a fine of Taka 100,000 (approx AU\$1388), or with both. The penalty gets lighter when the breach causes a serious injury which attracts a maximum penalty of two years' imprisonment or Taka 10,000 (approx AU\$138) fine, or both. The lowest offence is committed when the contravention causes other harms or injuries, and the maximum punishment goes as low as six months' imprisonment, or Taka 2,000 (approx AU\$27) fine or both. Section 309(2) states that the amount of fine either in full or in part can be ordered by the Labour Court, the sole competent court to try offences under this law, to compensate the victims or their legal representatives. However, the amounts of fines beg an answer to the questions whether such a small fine can truly compensate a single victim, let alone the victims of numerous deaths or injuries, or whether it bears any deterrent value, general or specific deterrence regardless. It is appreciable that s309(3) allows the application of the general criminal law that provides for higher punishment for the same offence, although any conviction under the general law for workplace deaths remains illusive to date in Bangladesh. This is so because it has been discussed elsewhere that the general criminal law regime has significant drawbacks in relation to its articulation and application against business entities, which are evident from a serious lack of conviction for workplace offences despite institution of several prosecutions in the past. Thus the drawbacks render the BLA2006 factually the sole law to deal with workplace safety in Bangladesh until the criminal law is amended. It means the above low penalties apply to the cases even where deaths occur. From this point of view, the penalties are manifestly low and so is the penalty for serious injuries. Therefore, penalties need to be increased in order to reap the benefit of this law by punishing offences adequately and deterring potential violators effectively. It is worth mentioning that although a better articulated criminal law regime is in place in NSW and the WHSA2011 creates duty and risk based offences rather than consequence, the highest penalty under the WHSA2011 is higher than that of the BLA2006.

In NSW, if an offence is committed by an individual (other than as a person conducting a business or undertaking or as an officer of a person conducting a business or undertaking) under s31, the maximum penalty is a fine of AU\$300,000 or five years imprisonment or both. Where the offender is an individual as a person conducting a business or undertaking or as an officer of a person conducting a business or undertaking, the penalty is AU\$600,000 or five years imprisonment or both. However, if a breach of s31 is committed by a body corporate, the penalty is AU\$ three million.

Although a commonality between the penalties exists that neither of the two jurisdictions provides for a mandatory imprisonment of any term, they are significantly different. Penalties under the BLA2006 are considerably lower than those of the WHSA2011 even though the former punishes for causing death or serious injury or bodily harm, while the latter prescribes punishment for exposing an individual to a risk of death or serious injury or illness. The penalties in Bangladesh appear to be too low to work as an effective deterrent. This is so because, in the absence of mandatory imprisonment, a fine can be any amount within the prescribed limit as may be determined by the sentencing judge. Moreover, a company or its executives may get rid of this liability by paying a fine alone. The figures are manifestly insignificant compared to those provided under s31. The figures under the BLA2006

themselves are self-explanatory to be too low to constitute an effective deterrent and compensate any victim in the true sense. Penalties need to be painful,⁸⁴ but these amounts of fines may not reasonably inflict any pain to an individual offender, let alone a business establishment. Hence, it is open to question whether such a low penalty would work as sufficient deterrence or it reflects the community's denunciation of the wrongful conduct. It can be argued that in order to achieve the objectives of sentencing such as punishing the offence adequately and creating deterrence etc,⁸⁵ both the jail terms and fines should be increased in s309 to a reasonable extent.

Another important point to ponder is that there is no punishment for non-compliance per se under the BLA2006, whereas s33 of the WHSA2011 makes failure to comply with the statutory duty an absolute liability offence without any consequence being required. So, a failure to comply with the health and safety duty per se is an offence in NSW. In line with s33 of the WHSA2011, a new provision needs to be inserted in the BLA2006, so that a breach of the legislation which has the potential of causing severe harms including deaths of humans may be punished without having to wait for a consequence. This is justified from the theory of prevention of harm⁸⁶ and protection of community.

Further, unlike the WHSA2011, there has been no higher penalty prescribed for a business entity. It is plausible to markedly distinguish between an entity and individual with respect to fines as it has been done in NSW where the penalties are prescribed based on the offender and the highest fine has been stipulated for a body corporate. No such consideration is apparent in the BLA2006 which needs to be amended by increasing fines for the offending entity, otherwise treating an individual and entity alike will not be helpful in achieving the objectives of punishment.

Appreciably, if the offence is committed by a company or other business entity, all of its executives and officers can be punished based on their engagement with the breach subject to statutory defences. This is a good provision for the purposes of deterrence, but their duties with regard to workplace health and safety needs to be clarified as alluded to earlier.

H. Conclusions

The foregoing discussions reveal that garments factory fires have burnt down numerous poor workers predominantly young women in Bangladesh over the years, yet evidently no serious concern is shown for their lives as well as for several millions of those who are fortunately still alive. The workplace safety in the country will not improve unless the perpetrators including the errant companies are adequately punished. This punishment warrants useful workplace health and safety laws which should succinctly define the offences and offenders, and prescribe stringent punishments that work as specific and general deterrence. Pritchard finds in relation to OHS that, fines alone do not work as a deterrent penalty.⁸⁷ Similarly, Broussard argued referring to fines that 'OSHA regulations and penalties are not an effective means of ensuring workplace safety. Corporations often consider both OSHA penalties

⁸⁴ See Brown et al (2011), above n 17, 1079 citing D Garland.

⁸⁵ See the 'purposes of sentencing' in s3A of the *Crimes (Sentencing Procedure) Act 1999* (NSW).

⁸⁶ See Brown et al (2011), above n 17, 76-79.

⁸⁷ Melanie Pritchard, 'Corporate Manslaughter: The Dawning of a New Era' (1997) 27 *Hong Kong Law Journal* 40, 46.

[pecuniary] and civil liability as a cost of business....⁸⁸ Despite deterrence being the most appropriate theory for negligent crimes,⁸⁹ the OHS laws largely rely on fines. A study of the UK health and safety executives conducted in 1988 found that most of the workplace deaths occurred due to a lack of simple planning and precautions and their deaths were avoidable.⁹⁰ Alarming, it found that 70 per cent of 739 deaths investigated in the study could have been avoided if the management had taken appropriate measures.⁹¹

Although both jurisdictions theoretically allow manslaughter prosecutions under their relevant general criminal law, but in practice, there is no instance of such a criminal proceeding being successful for workplace deaths in Bangladesh.⁹² Consequently, the offenders remain unpunished for such a heinous offence, the right to life of workers is denied, the most vital sector of the national economy is on the verge of losing benefits of preferential access to developed countries, and the image of the nation is also at stake owing to the absence of workers' safety.

Presently, penalties for workplace deaths are not sufficient to create effective deterrence and to punish offenders adequately in either jurisdiction. The overall penalties under s309 of the BLA2006 are low. Such a low penalty does not demonstrate community's opprobrium against such disgraceful conduct.⁹³ Penalties under s309 of the BLA2006 may be too low to achieve most of the objectives of punishment. It is therefore recommended that the existing penalties be increased to a reasonable extent.

It is justified that the criminal liability of companies and their executives for deaths and injuries of workers at work due to the entity's failure to comply with the safety requirements set out in s62 is absolute under s309 of the BLA2006. No defence is available to the company itself. However, statutory defences of lack of knowledge or consent or exercise of due diligence are available to executives under s312, though they bear the onus to prove the defences in order to escape the liability. The description of imposition of duties and corresponding penalties for breaches suggest that the liability of both companies and their executives for any of the three specified consequences is absolute under the BLA2006. This is supportive of workers' safety.

It is unclear whether officers owe duty to their employers alone or to workers as well. A reading of s309 together with s312 of the BLA2006 suggests that the legislation imposes liability on both the entity and its executives, but s62 which imposes the duty apparently on the entity alone creates confusion. In common law, the duty of care is owed by the company itself not by any officers. So the basis of their penalty needs to be clarified.

As all breaches are punishable based on their consequences under s309 of the BLA2006, no individual or the delinquent company can be punished for contravention or omission per se.

⁸⁸ Judy K Broussard, 'The Criminal Corporation: Is Ohio Prepared for Corporate Criminal Prosecutions for Workplace Fatalities?' (1997) 45 *Cleveland State Law Review* 135, 163.

⁸⁹ Leslie Yalof Garfield, 'A More Principled Approach to Criminalising Negligence: A Prescription for the Legislature' (1998) 65 *Tennessee Law Review* 875, 880. Other major theories of punishment are: retribution, rehabilitation and incapacitation.

⁹⁰ Blackspot Construction (London: HMSO 1988) as cited in Pritchard (1997), above n 87, 45.

⁹¹ Celia Wells, 'Manslaughter and Corporate Crime' (1989) 139 *New Law Journal* 931, 932.

⁹² The drawbacks of general criminal law governing homicide have been discussed elsewhere.

⁹³ See Wheelwright (2011), above n 55, 235.

By contrast, s33 of the WHSA2011 provides punishment for mere failure to comply with the duty. This is reasonable from the perspective of regulatory offence, and it would be unwitting to wait for a consequence to occur. Therefore, the BLA2006 should include a provision similar to s33 of the WHSA2011.

In the BLA2006, entities and individuals are not distinguished with respect to penalties. This sounds unreasonable. Generally, the amounts of fines for entities are significantly higher than those prescribed for individuals. This distinction is well reflected in the WHSA2011.

Enforcement of law denotes the realisation of the ends clearly stated or inherent in a particular legal principle. Clarity in the law of its purpose and purview is essential for its smooth enforcement in any jurisdiction. Any ambiguity in the articulation of law in relation to liability may ultimately favour the offender based on the principle of benefit of doubt. The workplace health and safety laws aim to protect people especially the workers at work by deterring the potential offenders. But the law has miserably failed to achieve this end in Bangladesh where several hundreds of people have died in the workplace over the past two decades, no one has been punished for 'killing' the innocent workers. The garments industry in Bangladesh is at stake now following frequent fires, collapses of factory buildings, the impunity of their perpetrators and resultant insecurity of workers at the workplace. Even the 2012 US Report on human rights situation released on 19 April 2013 has highlighted the 'poor working conditions and labour rights' as a significant human rights problem in Bangladesh.⁹⁴ The government needs to address the loopholes in the BLA2006 without any further delay not only in the interest of the national economy, but also for saving the lives of the millions of people who are the breadwinners for their families, and at the same time, are diligent earners of direly needed foreign currencies for the country.

⁹⁴ U S Department of State, 2012 Human Rights Reports: Bangladesh - 2012 Country Reports on Human Rights Practices –Report (19 Apr 2013) <http://www.state.gov/j/drl/rls/hrrpt/2012/sca/204395.htm>.